

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DAVID DELUCA, et al.,

Plaintiffs,

v.

FARMERS INSURANCE EXCHANGE,

Defendant.

Case No.17-cv-00034-EDL

**ORDER ON CROSS-MOTIONS FOR
SUMMARY JUDGMENT**

Re: Dkt. Nos. 125, 128

The parties to this employee misclassification case arising under the Federal Labor Standards Act (“FLSA”) and California, Michigan, and New York state law filed cross motions for summary judgment. As discussed below in great detail, the Court resolves the cross motions for summary judgment as follows:

- GRANTS Plaintiffs’ motion for summary judgment on the administrative exemption and DENIES Farmers’ cross motion for summary judgment on the administrative exemption.
- DENIES Plaintiffs’ motion for summary judgment on willfulness.
- DENIES Plaintiffs’ motion for summary judgment on liquidated damages.
- GRANTS Plaintiffs’ motion for summary judgment on the calculation of FLSA damages at 1.5x.
- GRANTS Farmers’ motion for summary judgment on Plaintiff Laughlin’s FLSA claim.
- DENIES Plaintiffs’ motion for summary judgment on the Section 203 waiting time penalties.
- DENIES Plaintiffs’ motion for summary judgment on the meal period claim.
- GRANTS Plaintiffs’ motion for summary judgment on the itemized wage claims under New York (N.Y. Lab. Law § 195(3)) and California Law (Cal. Lab. Code § 226(a)(2)) and the claim that Farmers failed to provide Plaintiff Laughlin with required information about the timing, method, and amount of pay when she was hired, as required by New York Labor Law § 195(1).
- DENIES Farmers’ motion for summary judgment on the California unfair competition law claim.

I. FACTUAL BACKGROUND

The following facts are undisputed, except where noted. There are approximately 80 individual Plaintiffs in this case as special investigators employed by Farmers, comprised of approximately 40 named Plaintiffs and Opt-In Plaintiffs (members of the FLSA collective) and 57 Federal Rule of Civil Procedure 23 California-based class members, 17 of whom are also Opt-In Plaintiffs (collectively, “Plaintiffs”). Defendant Farmers Insurance Exchange (“Farmers” or “FIE”) is an inter-insurance exchange that sells homeowners insurance, auto insurance, commercial insurance, and financial services throughout the United States. Am. Compl., ¶ 9; Am. Answer, ¶¶ 9, 10. Farmers is the only entity that employed special investigators, including all Plaintiffs and absent class members. Gendell Decl., ¶¶ 5-6 (Head Human Resources Business Partner—Claims for Farmers Group, Inc.); Ex. 8, Masuen Dep. at 37:11-16; Ex. 15, Serafin Dep. at 121:25-122:16.

A. Special Investigations Unit’s Purpose and Structure

Farmers’ Special Investigations Unit (“SIU”) provides investigatory services to Farmers’ Claims Organization (“Claims”) when fraud is suspected in the submission of any insurance claim. Ex. 18, Wedding¹ Decl., ¶ 2. SIU’s purpose is to “educate, identify, detect, [and] resist fraudulent payments, or attempts to defraud the company through the insurance claims process.” Ex. 15, Serafin² Dep. at 123:5-8. SIU’s “calculated impact” in deterring fraud is valued at approximately \$50-60 million per year while it operates on a budget of approximately \$28 million. Ex. 15, Serafin Dep. at 124:11-17.

In the SIU hierarchy of employees, special investigators are at the lowest level. Ex. 31, Wedding Depo. at 41:19-25. Special investigators report to SIU Managers (“SIMs”)³ (5-7 in each

¹ Kamala Wedding testified as Farmers’ corporate representative for a Rule 30(b)(6) deposition. She has been the SIU Director since the July of 2015. Ex. 31, Wedding Dep. at 7:11-15; 34:16-18.

² Sean Zavala-Serafin was the SIU Director from 2013 to 2015. Ex. 30, Serafin Dep. at 9:17-22.

³ A senior special investigator might step in to serve as the “acting SIM” when the assigned SIM is unavailable. Ex. 2, Francis Dep. at 62:7-64:25.

zone), who report to five Zone Managers, who report to the SIU Director. Ex. 31, Wedding Dep. at 39:18-25. The five zones are: east, central, west, centralized support, and national. Id. at 40:19-21. According to Plaintiffs, the special investigators in this case are or were in the east, central, and west zones. Special investigators are salaried employees and, during the relevant period, no special investigator employed by Farmers in California made less than \$49,920 per year and some made more than \$100,000 annually. Rupert⁴ Decl., ¶ 5, Ex. 2; Francis Dep. at 96:15-20 (salary of approximately \$110,000 when he left Farmers). Some Plaintiffs testified that they understood at the time they were hired that the special investigator position was overtime exempt and that they would be paid the same salary regardless of the number of hours worked. Ex. 7, Grimes Dep. at 32:16-20, 33:2-8, 35:11-21, 155:5-8; Ex. 6, Reyes Dep. at 32:7-11, 37:7-21; Ex. 4, Daszko Dep. at 51:15-18, 56:19-57:2; Ex. 21, Hsieh⁵ Decl., ¶ 3.

Out of the millions of claims for insurance benefits filed by Farmers' insureds every year, approximately 2% of those claims are referred to SIU for investigation. Ex. 15, Serafin Dep. at 122:17-123:1. The role of special investigators is to "investigate potentially fraudulent claims, resolve indicators of fraud, and to help Farmers from paying out on illegitimate claims." Ex. 19, Bear⁶ Decl., ¶ 5. They "conduct investigations into those claims, they resolve the indicators and then they report their findings to the CR [claims representative] for them to make a decision." Ex. 24, Martinez Dep. at 34:9-11. Sometimes the insurance claims they investigate involve millions of dollars. Ex. 7, Grimes Dep. at 72:12-22 (worked several claims exceeding \$1 million); Ex. 4, Daszko Dep. at 145:19-146:3 (investigated \$2.5 million property claim involving stolen microchips). Special investigators are expected to collaborate with their "customers," the claims

⁴ Tami Rupert is a Senior Human Resources Coordinator who is employed by Farmers Group, Inc. Rupert Decl., ¶ 1. In this capacity, she provides human resources services for Farmers Group, Inc. and Farmers. Id.

⁵ Inge Hsieh has been a special investigator in Northern California since October 2016. Ex. 21, Hsieh Decl., ¶ 2.

⁶ David Bear is a SIM for Farmers and has worked in SIU since June 2012, starting as a special investigator and working his way up to SIM. Ex. 19, Bear Decl. ¶ 2.

representatives. Ex. 28, Page⁷ Dep. at 18:12-17. Several Farmers employees testified that investigating claims is the special investigators' main responsibility. Ex. 28, Page Dep. at 18:12-19:1 ("their primary role is to investigate claims or indicators of fraud that might be present, and they are collaborative with our claims partners"); Ex. 30, Serafin Dep. at 74:20-22 ("I think investigating is a critical core piece of what an investigator's time should be spent doing, but naturally there is [sic] other duties that are critical . . . but if you were to pull the job description for an investigator, I think the core of it would be centered around the investigative activity."); Ex. 24, Martinez⁸ Dep. at 34:16-24 (Q: "So would you agree with me that the main job of the special investigator is to investigate claims and report what they investigated or what they found to the claims rep?" A: "Yes.>").

Plaintiff David Deluca was employed as a special investigator from approximately April 2012 to May 2014. Am. Compl., ¶ 3. He was assigned to a territory that covered Santa Clara, Contra Costa, and Alameda Counties, and he reported to offices in San Jose and Concord, California. Id. Plaintiff Barry Francis was employed as a special investigator from approximately April 2006 to June 2016. Id., ¶ 4. He was assigned to cover San Francisco, Contra Costa, and San Mateo Counties, and reported to an office in Daly City, California. Id. Plaintiff Melissa Laughlin was employed as a special investigator from approximately December 2011 to September 2014 and covered territory on Long Island, New York. Id., ¶ 5. These named Plaintiffs, as with all other special investigators, were classified as exempt employees. Am. Answer, ¶ 13.

B. Investigations Process

A claim is routed to SIU for investigation after being identified by Claims as a suspect file. Ex. 31, Wedding Dep. at 87:2-88:6. Sometimes the Claims representative will initially contact a special investigator to discuss whether a claim has fraud indicators⁹ that warrant an investigation

⁷ Chris Page has been a SIM since 2007. Ex. 28, Page Dep. at 9:4-8.

⁸ Richard Martinez was a SIM until 2014, then worked as a trainer at SIU, and has worked in "National QA" since 2015. Ex. 24, Martinez Dep. at 9:21-10:5, 19:1-20:4.

⁹ According to Farmers' Onboarding journal, "[i]ndicators are simply possibility factors that identify files requiring further investigation." Ex. 6, SIU Onboarding Journal at FIE-DF00097. There are common indicators for different industries. For example, for vehicle theft fraud claims,

1 and other times the Claims representative will submit the claim through a system called the
 2 assignment manager. Id.; Ex. 6, Reyes Dep. at 68:17-70:1 (describing situation where Claims
 3 representative would call to obtain his opinion on whether a claim had a fraud indicator and should
 4 be referred to SIU for investigation). If the claim is routed through the assignment manager, that
 5 manager system assigns the file to a special investigator based on their proximity to the claim,
 6 who then reviews the file to determine whether an investigation is warranted and if s/he is the
 7 person who will conduct the investigation. Ex. 31, Wedding Dep. at 88:7-22. A special
 8 investigator does not need to accept every claim that is referred to the SIU. Ex. 25, Masuen¹⁰ Dep.
 9 at 61:10-12 (“It’s the investigator’s job to take a look at that file and see if they think we can have
 10 any impact on that claim.”); Ex. 22, Newell Decl., ¶ 6; Ex. 21, Hsieh Decl., ¶ 15 (“the decision to
 11 decline SIU involvement is my own” and she does not need to confer with her SIM before
 12 declining a file). At times, a special investigator may close a file mid-investigation because s/he
 13 decided that the claim did not warrant SIU involvement. Ex. 2, Francis Dep. at 85:17-25.

14 Once they have the file, special investigators contact the claim representative early on to
 15 consult about an investigation plan. Ex. 28, Page Dep. at 31:15-32:1. SIMs do not officially
 16 approve an investigation plan once it is drafted, although SIMs generally initially review them. Id.
 17 at 32:2-7. Each claim is unique and special investigators have “the freedom to tailor their tasks to
 18 that claim.” Ex. 13, Newell Dep. at 86:6-17. Plans are subject to change depending on whether
 19 developments in the investigation warrant a new direction. Ex. 6, Reyes Dep. at 75:20-76:23 (may
 20 need to make mid-investigation changes to the plan but would not need to seek approval first from
 21 Claims representative or SIM).

22 An investigation plan may include one or more of the following tasks: running background
 23 reports; taking detailed in-person statements; canvassing the relevant cite; following up with
 24 witnesses, police, and anyone else associated with the claim; reviewing cell phone records;

25 _____
 26 the National Insurance Crime Bureau has published a list of indicators, such as a temporary,
 27 recently issued, or out-of-state driver’s license or claims for expensive contents in the vehicle at
 28 the time of the theft. Ex. 7 at FIE-DF006652.

¹⁰ Diana Masuen is a SIM who previously worked as a special investigator. Ex. 8, Masuen Dep. at 19:2-5.

reviewing credit report; searching social media. Ex. 5, SIU Investigations Presentation, FIE-DF007669 (describing SIU's investigative tasks). Special investigators are expected to update their Claims partners as important developments occur in the course of their investigation. Ex. 1, Quality Guidelines.

The special investigators create a file for each claim they investigate. Ex. 28, Page Dep. at 18:21-22. Within the file, they record their investigative activities and, at the end of the investigation, record a summary or conclusion about their investigative findings. Id. at 18:23-19:1. The conclusions are "just a summary of the key points that [the special investigators] investigate." Ex. 13, Newell¹¹ Dep. at 96:24-25. "It may have what the indicators were. It will have what the tasks were, what the results of the tasks were that the [special investigator] did that are relevant to the claim. And it's just reporting the facts of what [SIU] found in the investigation in a concise manner to Claims." Ex. 13, Newell Dep. at 97:2-6; Ex. 18, Ambrosio Dep. at 7-9 ("Because the claim file is based on fact . . . It's just strictly fact."); Ex. 13, Newell Dep. at 63:7-13 ("we just want to report the pertinent information . . . the information that explains were the indicators resolved, what were the results, and not a step-by-step . . . replay of the entire investigation . . ."). Special investigators are not supposed to record their opinions in the file about whether fraud occurred or on any other issue, such as whether a witness was lying. Ex. 28, Page Dep. at 22:18-25, 23:5-20. At times, special investigators report insureds to the underwriting department if they thought their investigation yielded risk advice. Ex. 6, Reyes Dep. at 101:6-102:11 (provided risk advice to underwriting based on his own assessment without input from his supervisor); Ex. 15, Serafin Dep. at 128:19-129:15 (expected special investigators to report to underwriting if they encountered a risk in the course of performing their investigations); Ex. 12, Page Dep. at 121:17-122:9 (special investigators send risk advice to underwriting that they discover during investigations).

The Claims department has access to the file and can review it at any time. Ex. 13, Newell Dep. at 97:7-10; Ex. 28, Page Dep. at 19:20-20:2. The Claims representative uses the information

¹¹ Tom Newell has been a SIM since 1994. Ex. 22, Newell Decl., ¶ 2.

1 recorded in the file to inform their ultimate decision on whether or not to deny the claim, as the
2 Claims representative is ultimately responsible for making that decision. Ex. 28, Page Dep. at
3 20:3-7, 16-17; Ex. 25, Masuen Dep. at 36:21-23 (“[T]he claims office is ultimately the one that
4 makes a decision on the claim. We just provide the facts.”); Ex. 9, SIU California Yearly Anti
5 Fraud 2017 at FIE-DF007607.

6 A Claims representative may “informally discuss” the investigation with the special
7 investigator or another member of SIU. Ex. 28, Page Dep. at 9-12. Mr. Serafin, the former SIU
8 director, testified that at the conclusion of an investigation the special investigator is expected to
9 have a conversation with the Claims representative responsible for the file so that the special
10 investigator “could convey context and what they observed and have a more detailed
11 conversation.” Ex. 30, Serafin Dep. at 77:12-14. This conversation may include a “candid
12 discussion about what they observed, what they saw, and what they think the appropriate next
13 steps would be for that claim resolution.” Ex. 30, Serafin Dep. at 77:3-5. Mr. Page, an
14 experienced SIM, acknowledged that special investigators might give their informal opinion on
15 whether to pay or deny a claim based on fraud, but that he would not expect them to do so because
16 “it’s a fact-based investigation and I want them to steer away from their opinions on these things
17 as much as possible.” Ex. 28, Page Dep. at 69:23-70:15. Mr. Page further acknowledged that
18 some Claims representatives, especially inexperienced ones, may press the special investigators
19 for their opinions. Id. Some special investigators provided testimony that they sometimes
20 provided informal opinions to Claims representatives about whether to pay a claim or not. Ex. 4,
21 Daszko Dep. at 31:19-32:9 (would discuss the “ultimate legitimacy of the claim” with Claims
22 representatives about one-third of the time); Ex. 19, Bear Decl., ¶ 41 (when he was a special
23 investigator he “frequently had informal, verbal communications with the claims representative to
24 discuss relevant factual information about the ultimate legitimacy of the claim as well as my
25 factual observations relating to witness’s credibility”). Other Plaintiffs testified that they did not
26 offer these informal opinions. Ex. 3, Francis Dep. at 186:7-14 (in response to question about
27 whether to deny or pay claim, he would respond “That’s a claims office decision.”); Ex. 20,
28 Deluca Dep. at 41:8-41:12 (refused to offer conclusions to Claims representatives); Ex. 22,

1 Grimes Dep. at 51:12-52:5 (if asked, would tell Claims representative that “we are not allowed to
2 give our opinion or tell them what we think should happen next”). Special investigators are
3 neither trained to provide their opinions nor are they evaluated on giving them. Ex. 18, Ambrosio
4 Dep. at 115:10-12 (no training to give ultimate opinion on fraud and not evaluated on giving
5 informal opinions); Ex. 28, Page Dep. at 70:16-19 (same).

6 In conducting their work, special investigators are encouraged to “think very
7 independently” and determine in their discretion “how and what to investigate when they receive a
8 claim.” Ex. 19, Bear Decl., ¶ 6; Ex. 22, Newell Decl., ¶ 8 (“I believe it is important to afford
9 special investigators under my supervision the freedom and latitude to plan and conduct
10 investigations in the manner they see appropriate based on the nature of the specific claim,
11 including the particular indicators of fraud present in the claim file.”). SIMs do not micromanage
12 the special investigators and special investigators largely work independently and from the field.
13 Ex. 7, Grimes Dep. at 94:22-95:8 (she was never given a daily task list and was expected to
14 management her own workflow); Ex. 22, Newell Decl., ¶¶ 18 (“As a SIM, I have never directed or
15 mandated that special investigators perform their investigations in a certain manner or sequence.”),
16 19 (special investigators under his supervision are “remote or virtual employees who work out of
17 their homes, in the field, and occasionally visit different Branch Claims Offices”); Ex. 21, Hsieh
18 Decl., ¶ 5 (“So long as I get my work done, Ms. Masuen leaves me alone to schedule my
19 workload, create my investigation plans, and to carry out my investigations as I decide.”); Ex. 6,
20 Reyes Dep. at 65:8-11 (worked from home 99% of the time); Ex. 2, Francis Dep. at 106:22-107:2
21 (primarily worked out on the field). The special investigators maintained flexible schedules that
22 were not dictated by their supervisors. Ex. 2, Francis Dep. at 102:18-23 (testifying that he had no
23 set schedule); Ex. 8, Masuen Dep. at 124:7-19 (explaining that special investigators under her
24 supervision made their own schedules and were allowed flexibility to attend to personal
25 obligations during the normal workday); Ex. 22, Newell Decl., ¶ 19 (“As SIM, I do not take any
26 steps to monitor the whereabouts of an investigator on a daily basis. How a special investigator
27 chooses to spend his or time [sic] is their own decision.”). Special investigators are not prevented
28 from taking meal breaks. Ex. 21, Hsieh Decl., ¶ 27 (“As a special investigator, I am able to take a

1 break whenever I want to take a break during the day . . . No one at FIE has ever told me that I
2 should not take my meal break . . . ”); Ex. 2, Francis Dep. at 222:11-16 (never told not to take a
3 meal or rest break).

4 **C. Special Investigator Training, Quality Guidelines, and Audits**

5 Over time, Farmers has shifted the process it uses for evaluating the quality of SIU’s
6 investigations, but there have always been guidelines against which investigations were reviewed.
7 Ex. 30, Serafin Dep. at 29:2-30:13. Historically, before the U.S. District Court for the District of
8 Minnesota ruled that Farmers misclassified special investigators as administratively exempt under
9 the FLSA and California law in Fenton v. Farmers Ins. Exch., 663. F. Supp. 2d 718 (D. Minn.
10 2009), Farmers used a quality assurance (QA) system to audit special investigators’ work that
11 provided a quantitative score for their performance. Id. at 726 (noting that the QA guidelines
12 “explain in great detail how plaintiffs should approach dozens of issues that typically arise in the
13 performance and documentation of investigations”). Prior to around 2013, special investigators
14 conducted their investigations using a QA checklist, but special investigators have since stopped
15 using the checklist. Ex. 30, Serafin Dep. at 112:22-113:20; Ex. 4, Daszko Dep. at 164:20-25.¹²

16 In approximately 2013 or 2014, SIU changed the QA reviews and standards to behavior-
17 based Investigative Quality (“IQ”) reviews and standards and eliminated the checklist. Ex. 30,
18 Serafin Dep. at 29:13-30:13; Ex. 14, Francis Files (contain numerical score for his files in 2014,
19 according to Plaintiffs, although the document is not dated).¹³ The purpose of the changes was
20 “to get rid of the checklist mentality” and eliminate the scoring of special investigators’ work. Ex.
21 18, Ambrosio Dep. at 63:5-15; Ex. 15, Serafin Dep. at 112:20-21 (“we went away from any kind
22

23 ¹² Farmers claims that Mr. Daszko used a “leash” analogy to explain that his investigations are less
24 constrained since the QA changes in 2013. However, the portion of Mr. Daszko’s deposition
transcript that they cite (Ex. 4 at 92:13-18) does not contain that analogy.

25 ¹³ Mr. Serafin testified at his deposition about this transition away from QA to IQ. He testified
26 that he participated in a working group that devised these revisions and that he did not “believe
27 when we were creating these we had any feeling that we were not in compliance with [the Fair
Labor Standards Act,” “[s]o, that wouldn’t have factored in.” Ex. 30, Serafin Dep. at 50:17-51:5.
28 Instead, his “vision and purpose in revising these was . . . really tied to evolving us to a place of
behavior-based performance.” Id. at 51:5-7. He testified that he was aware of the Fenton
decision, but that it did not impact the instructions he gave to his working group about the QA
revisions. Id. at 43:5-17, 45:2-22.

of checklist and any kind of scoring”). Witnesses explained that the revisions to the quality standards and review process had the effect of reducing inapplicable and unnecessary work on a given investigation. Ex. 31, Wedding Dep. at 144:12-17 (“ . . . at one time there was a requirement that field investigators had to do field work on every file, so that also would to the unnecessary work, and so that – I would say the teams where that was a requirement, there’s no such requirement”); Ex. 30, Serafin Dep. at 112:8-114:17 (the changes helped special investigators move “through the process efficiently, thereby creating minimal delay and costing the company less money to get the proper resolution . . . if they weren’t doing unnecessary tasks, then they should be probably more effective in how quickly they got to the right answers”).

After the transition, SIU supervisors used quality guidelines to assess the special investigators’ performance, which were provided to the special investigators for their reference. Ex. 30, Serafin Dep. at 25:11-26:21. These guidelines were called the SIU Investigation Quality Best Practices Guidelines. Exs. 1-3 (these exhibits contain three different versions of the guidelines, the most recent version appears to be from 2015) (the “Guidelines”). The Guidelines cover timeliness, investigation, regulatory compliance, and documentation. Exs 1-3 at 1. In declarations supporting their motion for class certification, Plaintiffs Deluca, Francis, Daszko, O’Brien, and Stewart stated that the “SIU Quality Assurance Guidelines (QA)” “applied and controlled how special investigators worked on their files” throughout their employment. Dkt. No. 69-9 (¶ 10). Plaintiff Deluca explained that he tried to adhere to what the guidelines required and that he did not know if there was anything else he would have done that was not in the guidelines. Ex. 3, Deluca Dep. at 110:19-111:23.

According to Plaintiffs, SIMs review a sampling of special investigators’ files using a program called TeamThink that includes a standard set of review questions that include basic questions about the claim and investigation, as well as qualitative questions such as whether the “investigative thought process [was] proactive and efficient” and whether “the claim [was] handled within state regulatory requirements.” Exs. 12-13 (reviews from 2016 and 2017).¹⁴

¹⁴ Plaintiffs cited deposition testimony from Thomas Newell that supposedly supported the statement that SIMs review about two claim files per month per special investigator using the

1 These reviews include the SIMs' comments and feedback, such as comments that the SIM "would
2 be careful about putting in your opinion about what caused the damage. Stick to reporting the
3 facts only." Ex. 12 at FIE-DF006600. If a special investigator's file failed to meet an expectation,
4 such as an expectation about timeliness of completion, an "exception" will be noted and,
5 generally, discussed with the special investigator. Ex. 28, Page Dep. at 46:2-25; Ex. 24, Martinez
6 Dep. at 75:1376:2 (using TeamThink questionnaire as a tool for coaching special investigators).
7 During discovery, Farmers provided a report listing the results of hundreds of claims reviews.
8 Brome Decl., ¶ 3; Ex. 32 (184-page compilation of review comments).

9 Although SIMs appear to perform some degree of qualitative review of special
10 investigators' files, there is evidence that each SIM was given discretion to perform quality
11 reviews.¹⁵ Ex. 18, Wedding Decl., ¶ 15 ("SIMs periodically conduct a review of the open cases
12 that a special investigator is handling . . . The quality review of claim files, however, is left to the
13 discretion of the SIM at the local level."). Michael Ambrosio testified that SIU discontinued
14 regular quality reviews around 2014 because they had "consistently . . . high, high-quality
15 reviews" and "at that point, we felt there was really no value." Ex. 10, Ambrosio Dep. at 57:15-
16 21. From then on, SIU moved to "more of a spot checking, random checking, by the SIMs. More
17 of a trust but verify kind of approach versus a rigid review." Ex. 10, Ambrosio Dep. at 58:6-8. In
18 addition to their own review, some SIMs, such as Diane Masuen, asks her special investigators to
19 perform a peer review of the other special investigators' files. Ex. 8, Masuen Dep. at 79:4-9.

20 Objective measures are tracked regarding the special investigators' productivity and
21 impact. These measures include the volume of claims closed by the special investigators, how
22 long it takes to close files, and the dollar value of claims that are "deterred" by SIU's work. Ex.
23 28, Page Dep. at 54:25-55:13, 55:23-57:2, Ex. 11 at FIE-DF002939; Ex. 30, Serafin Dep. at 13:4-
24 25, 135:15-21. A department outside of SIU, called National QA, has conducted audits of SIU

25 _____
26 standardized questions in TeamThink, but the cited testimony (Dep. at 44:23-45:7) did not support
27 that statement, nor was it related to it.

28 ¹⁵ Farmers cites Mr. Serafin's deposition for the proposition that "a SIM reviews only two claims
per month for each investigator." However, the citation provided – Ex. 15, Serafin Dep. at 31:6-
18 does not support that statement.

1 files. Ex. 18, Ambrosio Dep. at 70:6-71:9. Richard Martinez, who used to work in SIU and
 2 moved to National QA in 2015, explained that National QA used to randomly pull 120 files to
 3 review every quarter, which included SIU's contribution to the file, and generate a benchmark
 4 report on its findings. Ex. 24, Martinez Dep. at 48:17-49:20. The purpose of these audits, the
 5 results of which were only provided to SIU leadership, was to look at "overall work, overall trends
 6 and patterns that we are seeing in terms of . . . their teams [sic] behavior." Ex. 14, Martinez Dep.
 7 at 58:21-59:14. More recently, National QA has moved toward more targeted reviews, such as the
 8 use of private investigators and the effectiveness of the use of social media for investigations. Ex.
 9 24, Martinez Dep. at 57:6-23.

10 Starting in 2016, Special Investigators completed a three- to four-week training module
 11 called "SIU Fundamentals" intended to prepare them to fulfill their job responsibilities. Ex. 10,
 12 SIU Fundamentals at FIE-DF006904; Pl. Supp. Br., Page Dep. at 112:7-113:16. SIU
 13 Fundamentals training touches a wide range of relevant topics, including investigation basics (e.g.,
 14 taking witness statements and checking databases), indicator lists, investigative quality, and
 15 regulatory compliance. Id. Before that time, Farmers used a new hire program called the
 16 Onboarding Journal. Ex. 6.

17 **D. Government Reporting Function**

18 SIU is an internal investigatory function that is mandated by the State of California's
 19 Department of Insurance ("DOI"). Ex. 2, Francis Dep. at 97:8-12; Ex. 11, Stewart Dep. at 52:4-
 20 11. Under certain circumstances, special investigators are expected to report claims to DOI or the
 21 National Insurance Crime Bureau ("NICB"). Ex. 25, Masuen Dep. at 84:13-16. Reporting to
 22 these entities is required by state and federal law. Ex. 18, Ambrosio Dep. at 91:23-92:16. Special
 23 investigators receive training on how to properly complete the DOI and NICB reports and Farmers
 24 had guidelines for ensuring that referrals had all necessary information. Ex. 18, Ambrosio Dep. at
 25 93:1-12, Ex. 8, FIE-DF007374 (internal Farmers email providing tips for NICB and DOI
 26 referrals). Claims are reported to these entities when there are unresolved fraud indicators after an
 27 investigation. Ex. 25, Masuen Dep. at 86:1-10; Ex. 28, Page Dep. at 74:4-13; Ex. 22, Grimes Dep.
 28 at 47:9-14; Ex. 20, Deluca Dep. at 25:8-26:5. In California, the technical standard is when one

1 “reasonably believes or knows that a fraudulent claim is being made.” Cal. Ins. Code § 1872.4(a).

2 Several SIU employees testified that they referred nearly all claims they investigated to
3 DOI and/or NICB. Ex. 28, O’Brien Dep. at 107:8-21 (his best recollection was that he referred
4 every claim to NICB); Ex. 29, Reyes Dep. at 77:17-78:4 (reported “essentially, almost all
5 claims”). For some special investigators, their SIMs supervised some or most of their referrals to
6 NICB and DOI. Ex. 22, Grimes Dep. at 47:22-48:5 (referrals were generally determined by
7 special investigators but sometimes her manager directed her to refer claims that she would not
8 have referred); Ex. 29, Reyes Dep. at 79:18-80:5 (same); Ex. 20, Deluca Dep. at 29:20-30:25)
9 (asked SIM whether referral was appropriate “[m]ost of the time”). Once SIU makes a referral to
10 NICB or DOI, it is up to that agency to decide how to handle the claim. Ex. 28, Page Dep. at
11 78:23-79:1.

12 In addition to referrals to NICB and DOI, a special investigator may report a claim to law
13 enforcement to “shar[e] information” and “build rapport.” Ex. 7, Grimes Dep. at 27:17-28:11
14 (would communicate with district attorneys in California in connection with investigations of
15 workers compensation claims); Ex. 4, Daszko Dep. at 163:5-164:19.

16 **E. Industry Events and Training for Claims Representatives**

17 Special investigators may provide training to Claims representatives about SIU’s work and
18 some special investigators attend industry meetings and events or conduct trainings for outside
19 groups. Ex. 18, Ambrosio Dep. at 98:6-99:8 (a small number of special investigators provide
20 training to Claims representatives and it is “encouraged, but not required”); Ex. 18, Ambrosio
21 Dep. at 40:1-21 (some special investigators attended outside industry meetings). However, these
22 events and trainings were not especially time consuming and were not a large portion of the tasks
23 the special investigators performed as part of their job duties. Ex. 18, Ambrosio Dep. at 40:23-
24 41:4 (for special investigators who attended industry meetings frequently they would spend
25 “[o]nly a couple hours a month” at them); Ex. 18, Ambrosio Dep. at 100:15-101:3 (trainings occur
26 once or twice a year for approximately 15-20 minutes).

27 **F. Tracking Time Worked and Breaks**

28 There is evidence that special investigators worked over 40 hours per week to investigate

all of the files assigned to them. Dkt. No. 69-9, Deluca Dec., ¶ 11; Francis Dec., ¶ 11; Daszko Dec., ¶ 11; O’Brien Dec., ¶ 11; Stewart Dec., ¶ 11 (stating that they “routinely worked over 40 hours per week” and that they “did not receive any overtime compensation for any of those hours”). Mr. Page, who is a SIM, testified at his deposition that he discourages special investigators from working over 40 hours a week but he “know[s] it happens.” Ex. 28, Page Dep. at 98:13. He also stated, however, that “[i]t tends to balance itself out.” Ex. 28, Page Dep. at 98:13-14.¹⁶ Farmers does not keep records of the hours that the special investigators worked and, therefore, the special investigators may be in the best position to identify how many hours they worked. Ex. 18, Ambrosio Dep. at 87:11-88:1; Ex. 28, Page Dep. at 100:22-24. The pay stubs provided to special investigators do not indicate the number of hours worked. Ex. 15, FIE-DF004398 (sample wage statement).

Farmers’ meal and rest break policies did not provide second meal breaks for the exempt special investigators. The policies either (1) applied to “all employees” (i.e., exempt and nonexempt) but only provided first meal breaks without mention of second meal breaks; or (2) only provided second meal breaks for nonexempt employees. Dkt. No. 69-3. Plaintiffs testified that they regularly worked through their meal periods without taking dedicated meal periods. Ex. 21, Francis Dep. at 218:2-219:8 (worked through lunch); Ex. 20, Deluca Dep. at 149:12-24 (“I can’t really say that I ever took lunch” and “a lot of times we’d eat right there [in the office] while we’re working”).

G. Laughlin’s Employment

Melissa Laughlin, the New York Plaintiff, was employed as a special investigator from December 27, 2011 through August 29, 2014. McCoy Decl., ¶ 17, Ex. 16 (Laughlin’s responses to Requests for Admission state that she “admits that her employment with Farmers began around that time, but does not recall the specific date. Plaintiff does not dispute that Farmers’ records may show that her employment started on December 27, 2011.” She similarly did not dispute the

¹⁶ Plaintiffs acknowledge that there is a dispute about the amount and frequency of overtime worked by the special investigators. However, they contend that that issue goes to the amount of damages and not liability.

end date of her employment in her response to the Request for Admission. The complaint was filed on January 4, 2017, and Laughlin filed her consent to join form on October 23, 2017.

II. PROCEDURAL HISTORY

On January 4, 2017, Plaintiffs filed this lawsuit contending that Farmers misclassified them as overtime exempt. Plaintiffs alleged claims under FLSA for overtime and California's wage and hour laws for waiting time and wage statement penalties and premiums for missed meal periods. The Court conditionally certified Plaintiffs' FLSA claims on August 1, 2017 and certified a class of special investigators who worked for Farmers in California on February 27, 2018.

On November 8, 2018, the Court granted in part and denied in part Plaintiffs' motion to leave to amend their complaint. The Court permitted Plaintiffs to amend the complaint to add New York Plaintiff Melissa Laughlin and her New York state law claims but denied the addition of Michigan Plaintiffs Timothy Bethel, Thomas Berry, and Mark Ritzema and their Michigan state law claims. Plaintiffs filed an amended complaint on November 13, 2018 to add Plaintiff Laughlin's claims that Farmers violated New York's overtime law, New York Labor Law Art. 19, §§ 650 et seq., and provided deficient notice and wage statements in violation of New York's Wage Theft Act, New York Labor Law Art. 6, §§ 190 et seq. On April 15, 2019, the Court granted the parties' stipulation to dismiss other Farmers entities: Defendants Farmers Group, Inc., Farmers Insurance Company, Inc., and Farmers Specialty Insurance Company, Inc.

III. LEGAL STANDARD

Summary judgment shall be granted if "the pleadings, discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Material facts are those which may affect the outcome of the case. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. Id. The court must view the facts in the light most favorable to the non-moving party and give it the benefit of all reasonable inferences to be drawn from those facts. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,

475 U.S. 574, 587 (1986). The court must not weigh the evidence or determine the truth of the matter, but only determine whether there is a genuine issue for trial. See Balint v. Carson City, 180 F.3d 1047, 1054 (9th Cir. 1999).

A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. On an issue where the nonmoving party will bear the burden of proof at trial, the moving party can prevail merely by pointing out to the district court that there is an absence of evidence to support the nonmoving party's case. Id. If the moving party meets its initial burden, the opposing party "may not rely merely on allegations or denials in its own pleading;" rather, it must set forth "specific facts showing a genuine issue for trial." See Fed. R. Civ. P. 56(e)(2); Anderson, 477 U.S. at 250. If the nonmoving party fails to show that there is a genuine issue for trial, "the moving party is entitled to judgment as a matter of law." Celotex, 477 U.S. at 323.

IV. DISCUSSION

A. Administrative Exemption

1. Legal Framework

An "employee employed in a bona fide administrative capacity" is exempt from overtime compensation requirements under the FLSA and applicable California and New York state law. To meet this exemption, Farmers must prove that the special investigators are:

- (1) Compensated on a salary or fee basis at a rate of not less than \$455 per week (or \$380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;
- (1) Compensated on a salary or fee basis pursuant to § 541.600 at a rate per week of not less than the 40th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census Region (or 84 percent of that amount per week, if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging or other facilities. Beginning January 1, 2020, and every three years thereafter, the Secretary shall update the required salary amount pursuant to § 541.607;

- (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

29 C.F.R. § 541.200(a). The dispute in this case focuses on whether the second and third elements concerning the special investigators' "primary duty" are satisfied.¹⁷ Thus, this Court must address whether there are triable issues of fact as to whether the special investigators' primary duty (1) is "directly related to the management or general business operations" of Farmers, and (2) "includes the exercise of discretion and independent judgment with respect to matters of significance." *Id.* "Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole." *Id.*

The application of the administrative exemption is a mixed question of law and fact. "The nature of the employees' duties is a question of fact, and the application of the FLSA to those duties is a question of law." *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 910 (9th Cir. 2004). "Because the FLSA gives no 'textual indication' that its exemptions should be construed narrowly, 'there is no reason to give [them] anything other than a fair (rather than a 'narrow') interpretation.'" *Encino Motorcars, LLC v. Navarro*, __ U.S. __, 138 S. Ct. 1134, 1142 (2018) (quoting Scalia & B. Garner, *Reading Law*, at 363 (2012)). The administrative exemption is an affirmative defense, so Farmers bears the burden of proving that it applies in this case. *Klem v. Cnty. of Santa Clara, California*, 208 F.3d 1085, 1089 (9th Cir. 2000).

¹⁷ There is no dispute among the parties that the FLSA test governs these motions. Farmers acknowledges that New York law incorporates the FLSA administrative exemption. 12 N.Y. Comp. Code R. & R. Regs. tit. 12, § 142-2.2; *In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 157 (2d Cir. 2010). It also recognizes that California's administrative exemption does not expressly incorporate the FLSA exemption, although it is "essentially the same as the FLSA and New York law." Def. Mot. at 21 n.143. Farmers states that the only difference is that California law requires exempt work to be performed more than 50% of the time, and that the employee must be "primarily engaged" in administrative tasks rather than having those tasks as his "primary duty," and that it otherwise mirrors the federal exemption. Farmers explains that there is no dispute that Plaintiffs spend more than 50% of their time on the allegedly administrative work of conducting investigations. *Id.* Therefore, the Court has not analyzed the New York or California exemptions separately, except as to the qualitative and quantitative distinction under California law, which is discussed on pages 25-26 of this Order.

2. Analysis of Exemption

a. Primary Duty

The two disputed prongs of the administrative exemption both revolve around the special investigators' "primary duty." The parties dispute what their primary duty is, although there is no dispute that Plaintiffs spend a majority of their time investigating potentially fraudulent claims.

The term "primary duty" means "the principal, main, major or most important duty that the employee performs." 29 C.F.R. § 541.700(a). Facts to consider when determining the primary duty include but are not limited to: "the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee." *Id.*

Plaintiffs argue that their primary duty is conducting investigations. Plaintiffs cite deposition testimony from various current employees of Farmers that their primary duty is to investigate, as well as the fact that the SIU Onboarding Journal and the Guidelines both emphasize the investigation of claims even if they also mention other tasks performed by the special investigators such as regulatory compliance.

Turning the focus onto their "primary value" or end goal rather than their main task, Farmers contends that the special investigators' primary duty is to protect Farmers' assets against the threat of insurance fraud or, in a slightly different characterization, combat fraud. *See Ferrell v. Gwinnett Cnty. Bd. of Educ.*, 481 F. Supp. 2d 1338, 1344 (N.D. Ga. Mar. 30, 2007) (elevating the plaintiffs' primary value" to the defendant over consideration of the time spent performing certain duties). Farmers notes that insurance fraud is a multi-billion dollar threat. *See Cal. Ins. Code* § 1871(b) ("fraudulent activities account for 15 to 20 percent of all auto insurance payments"), (h) ("Although there are no precise figures, it is believed that fraudulent activities account for billions of dollars annually in added health care costs nationally."). Thus, Farmers asserts that all of Plaintiffs' tasks – from running their investigations to consulting with Claims representatives to reporting claims to NICB or DOI to training other personnel on fraud prevention and detection – should all be considered part of their primary duties. If the Court were to give

controlling weight to an employee's "primary value," as Farmers argues, it is likely that nearly all tasks an employee completes would be completed in service of her ultimate worth to the employee organization, unless the employee undertook truly unrelated tasks.

Instead, Plaintiffs' primary job duty is to conduct investigations into claims that indicate potential fraud, while their other responsibilities are secondary to that central task. Take, for example, Plaintiffs' responsibility to report potentially fraudulent claims to DOI and NCIB. There is undisputed evidence that nearly all claims that SIU investigates are referred to one or both entities, and that making those referrals takes up a relatively small percentage of Plaintiffs' time. See Calderon v. GEICO Gen. Ins. Co., 809 F.3d 111, 122 n.10 (4th Cir. 2015) (holding that insurance investigators' primary duty "was the investigation of suspected fraud" and that referring claims to law enforcement or the NICB or the defendant's underwriting department was not a primary duty because "nothing in the record . . . would support a conclusion that these responsibilities were any more than a minor part of the Investigators' jobs, either in their importance or in the amount of the Investigators' time that they occupy"). That task serves Farmers' overall goal of preventing and detecting insurance fraud and is necessary to comply with Farmers' legal obligations. But it is not central to the fundamental purpose of the special investigators, which is to avoid the payment of fraudulent claims in the first place. See Ex. 15, Serafin Dep. at 123:5-8 (SIU's purpose is to "educate, identify, detect, [and] resist fraudulent payments, or attempts to defraud the company through the insurance claims process"). If, hypothetically, Farmers were to eliminate the duty to make referrals, the special investigators' jobs would remain largely the same.

The same is true of the other less time-intensive tasks that Plaintiffs perform in the course of their jobs. Farmers highlights the fact that some special investigators train Claims representatives and other personnel on issues related to fraud. Since providing training is not a requirement of the job and not all special investigators opt to give training, this activity cannot be considered part of Plaintiffs' primary duty. For essentially the same reasons, the provision of informal opinions to Claims representatives about the legitimacy of a claim are also not Plaintiffs' primary duty. Some special investigators testified that they give informal opinions about whether

to pay a claim, but there is also evidence that they are not trained to do so, it is not considered part of their job, some do not give these informal opinions, and their investigations and conclusions are factual only.

b. Directly Related

The next requirement¹⁸ of the test considers whether an employee “perform[s] work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.” 29 C.F.R. § 541.201(a).¹⁹ The regulation identifies the following non-exclusive list of functional areas of work that are “directly related to management or general business operations:”

[T]ax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities.

29 C.F.R. § 541.201(b).

The purpose of this prong of the test “is ‘to distinguish between work related to the goods and services which constitute the business’ marketplace offerings and work which contributes to running the business itself.” McKeen-Chaplin v. Provident Savings Bank, FSB, 862 F.3d 847,

¹⁸ Plaintiffs do not dispute that they perform office or non-manual work, which is another aspect of this prong of the test.

¹⁹ Farmers cites 29 C.F.R. § 541.205(b) for the proposition that “the administrative operations of the business include the work performed by so-called white-collar employees engaged in ‘servicing’ a business as, for example, advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control.” This regulatory provision no longer exists, as it was removed when the regulations were amended in 2004. However, 29 C.F.R. § 203 provides administrative exemption examples that makes the same point. For instance, “[e]mployees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer’s income, assets, investments or debts; determining which financial products best meet the customer’s needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer’s financial products.” 29 C.F.R. § 541.203(b). Also, “[h]uman resources managers who formulate, interpret or implement employment policies and management consultants who study the operations of a business and propose changes in organization generally meet the duties requirements for the administrative exemption.” 29 C.F.R. § 541.203(e).

852 (9th Cir. 2017) (quoting DOL Wage & Hour Div. Op. Ltr., 2010 WL 1822423, at *3 (Mar. 24, 2010)). “This requirement is met if the employee engages in ‘running the business itself or determining its overall course of policies,’ not just in the day-to-day carrying out of the business’ affairs.” Bothell v. Phase Metrics, Inc., 299 F.3d 1120, 1125 (9th Cir. 2002) (quoting Bratt v. Cnty. of Los Angeles, 912 F.2d 1066, 1068 (9th Cir. 2010)). However, this distinction can be “complicated” when the work at issue does not fall squarely on one side of this “administrative-production dichotomy.” McKeen-Chaplin, 862 F.3d at 852 (holding that the administrative exemption did not apply to mortgage underwriters); see also Bothell, 299 F.3d at 1127 (“[T]he dichotomy is but one analytical tool, to be used only to the extent it clarifies the analysis. Only when work falls ‘squarely on the production side of the line,’ has the administration/production dichotomy been determinative.”). The California Supreme Court has also recognized the limitations of strict adherence of the administrative/production dichotomy. See Harris v. Superior Court, 53 Cal. 4th 170, 188 (2011).

Plaintiffs rely on several relatively recent cases involving investigators to argue that because they conduct factual investigations, which are used by other employees, such as Claims representatives, to pay or deny a claim, they are engaged in the day-to-day business of Farmers’ and are not administrative workers. In Bratt, the Ninth Circuit affirmed the district court’s determination that probation officers were not exempt as administrative employees under the FLSA where their “primary responsibility” was “to conduct factual investigations of adult offenders or juvenile detainees and advise the court on their proper sentence or disposition within the system.” 912 F.2d at 1069. The court found that the district court had correctly interpreted the “directly related” prong of the exemption when it found that the probation officers’ work “primarily involves the day-to-day carrying out of the business’ affairs, rather than running the business itself or determining its overall course or policies,” and therefore the exemption did not apply to the plaintiffs. Id. at 1070.²⁰

²⁰ Farmers homes in on the statement in Harris that “Bratt’s persuasiveness is in doubt.” Harris, 53 Cal. 4th at 189. In Bratt, the Ninth Circuit analogized the probation officers’ work to the work of claims adjusters. At the time, claims adjusters were classified as non-exempt, but they have subsequently been held to be exempt under the FLSA’s overtime requirements under more recent

In Calderon, the Fourth Circuit considered whether the first prong foreclosed the application of the FLSA’s administrative exemption for employees in GEICO’s special investigations unit. Calling it a “very close legal question,” the Fourth Circuit ultimately found that GEICO had not met its burden to establish that the investigators’ primary duty is directly related to management or general business operations and reversed the district court’s determination that GEICO met that prong of the test.²¹ 809 F.3d at 130. Finding that the investigators’ “primary duty consists of conducting investigations to resolve narrow factual questions, namely whether particular claims submitted to GEICO were fraudulent,” in addition to “spend[ing] a small percentage of their time performing other duties,” like training adjusters about fraud, the Fourth Circuit concluded that the investigators did not meet the exemption because they were not part of GEICO’s management or running the business. Id. at 118, 124. Citing Bratt, the Calderon court concluded that the nature of the plaintiffs’ investigations work was not “directly related to GEICO’s management or general business operations” because the information they gathered was used in GEICO’s “day-to-day processing of their employers’ claims.” Id. at 126.

The Calderon court also noted that the role of fact investigator is more analogous to the “[p]ublic sector inspectors or investigators of various types, such as fire prevention or safety, building or construction, health or sanitation, environmental or soils specialists and similar employees,” whose work the regulations identify as *not* satisfying the “directly related” element of the administrative exemption. Id. at 127 (quoting 29 C.F.R. § 541.203(j)). The regulations further provide that the exemption does not apply to the following public sector jobs:

[P]olice officers, detectives, deputy sheriffs, state troopers, highway

federal regulations. The Harris opinion seems to call Bratt into doubt for reasons that are not necessarily applicable here (i.e., neither party is analogizing the special investigators to the role of employees in a different business enterprise), but it does further highlight that the Court cannot rigidly apply the administrative/production dichotomy.

²¹ To support its argument that the special investigators’ primary duty is directly related to their business, Farmers cites to reasoning from the district court opinion in GEICO that found that the investigators’ work was administrative in nature because “at the very least, [they] ‘assist’ GEICO claims adjusters in ‘adjusting claims.’” Calderon v. GEICO Gen. Ins. Co., 917 F. Supp. 2d 428, 441 (D. Md. 2012). On appeal, however, the Fourth Circuit reversed the district court’s finding that the investigators’ work satisfied that “directly related” to prong, as discussed above.

patrol officers, *investigators*, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; *conducting investigations or inspections for violations of law; performing surveillance*; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; *interviewing witnesses*; interrogating and fingerprinting suspects; *preparing investigative reports*; or other similar work.

29 C.F.R. § 541.3(b)(1) (emphasis added).²²

The Department of Labor (“DOL”) has issued several opinion letters that consistently conclude that conducting factual investigations is not administrative work that falls within the scope of the exemption. See DOL, Wage & Hour Div., Opinion Letter, FLSA 2018-13 (Jan. 5, 2018); DOL, Wage & Hour Div., Opinion Letter, FLSA 2005-21, 2005 WL 3308592 (Aug. 19, 2005); DOL, Wage & Hour Div., Opinion Letter, 1998 WL 852783 (Apr. 17, 1998); DOL, Wage & Hour Div., Opinion Letter, 1998 WL 852752 (Jan. 23, 1998); DOL, Wage & Hour Div., Opinion Letter, 1997 WL 971811 (Sept. 12, 1997). Farmers downplays the significance of these DOL opinion letters, arguing that they are not persuasive because many of the employers’ businesses are part of the investigations industry, but courts routinely cite these letters when evaluating the application of the administrative exemption to investigators who work within other industries, including the insurance industry. Although not controlling, the DOL opinion letters are useful interpretative material for determining the application of the exemption.

In 2013, the Sixth Circuit took a different view and held in Foster v. Nationwide Ins., 710 F.3d 640 (6th Cir. 2013), that insurance special investigators who investigate suspicious claims satisfy the administrative exemption. The Sixth Circuit affirmed the district court’s entry of

²² Other courts, such as Foster v. Nationwide Mutual Ins. Co., 695 F. Supp. 2d 748, 757-58 (S.D. Ohio 2010) and Mullins v. Target Corp., 2011 WL 1399262 (N.D. Ill. Apr. 13, 2011) (discussed in more detail below), declined to put undue weight on this regulation because it does not directly apply to private-sector employees. They reasoned that the administrative exemption is “inapplicable to employees in law-enforcement roles because their agencies are in the business of conducting investigations, so their work falls ‘squarely on the production side of the line.’” Mullins, 2011 WL 1399262, at *5 (quoting Foster, 695 F. Supp. at 758)).

1 partial summary judgment for Nationwide that the investigators' work was administrative in
 2 nature and judgment in favor of Nationwide after a bench trial that their primary duty included the
 3 exercise of discretion and independent judgment. The Foster court analyzed the "directly related"
 4 prong by considering whether the investigators' work was "ancillary" to the employer's general
 5 business operations. Id. at 646. Because the investigators work is "integral to the claims adjusting
 6 function, is performed in partnership with [claims adjusters], and involves making findings that
 7 bear directly on the [claims adjusters'] decisions to pay or deny a claim," the "investigative work
 8 that drives the claims adjusting decisions with respect to suspicious claims is also directly related
 9 to assisting with the servicing of Nationwide's business." Id.

10 Farmers argues that Foster is more persuasive and should be applied here because it was
 11 decided after trial. Moreover, Farmers notes that the Fourth Circuit stated that Calderon was a
 12 "very close legal question" and suggests that it would come out the other way after the Supreme
 13 Court's recent Encino decision repudiating a narrow construction of the FLSA exemptions.

14 Significantly, in 2017 the Ninth Circuit tacitly rejected the Sixth Circuit's "ancillary"
 15 activity approach when it held in McKeen-Chaplin that mortgage underwriters who "perform work
 16 that services the Bank's business, something ancillary to [the Bank's] principal production
 17 activity," were not directly related to the general business operations so as to warrant applying the
 18 administrative exemption. McKeen-Chaplin, 862 F.3d at 852-53. McKeen-Chaplin is consistent
 19 with the Fourth Circuit's approach in Calderon in which it rejected the Sixth Circuit's conclusion
 20 because it "fails to take into account that it is 'the nature of the work, not its ultimate
 21 consequence,' that controls whether the exemption applies." Calderon, 809 F.3d at 129 (citing
 22 Desmond v. PNGI Charles Town Gaming, L.L.C., 564 F.3d 688, 692 (4th Cir. 2009) and 29
 23 C.F.R. § 541.201(a) ("The phrase 'directly related to the management or general business
 24 operations' refers to the *type* of work performed by the employee.") (emphasis added)).

25 The Court is persuaded by Bratt, Calderon, McKeen-Chaplin, and the regulations and
 26 DOL's analysis that Plaintiffs' primary duty of conducting factual investigations that inform the
 27 Claims representatives' ultimate determination of whether to pay claims does not qualify as
 28 "directly related" to running Farmers' business or formulating or helping to execute policy such

that this prong of the exemption is satisfied. Plaintiffs' role is at least one step removed from activity that would qualify under this factor. While Plaintiffs support the Claims representatives who are executing policy, they themselves are not doing so. As Farmers notes in its motion, "[f]raud investigation protects the company and assists Claims to adjust claims." Def. Mot. at 26. There is no record evidence to show that Plaintiffs' investigative work is the sole category of information used by Claims representatives to make their determination about whether to pay claims. That Plaintiffs perform work that is ancillary to or relied upon by administratively exempt employees does not make the investigators administratively exempt as well. To conclude otherwise would permit "the exemption to swallow the rule." Roney v. United States, 790 F. Supp. 23, 28 (D.D.C. 1992).

On reply, Plaintiffs raise the additional argument that Farmers cannot meet its burden on California law to show that the special investigators' primary job duty was both qualitatively and quantitatively administrative, as set forth in Harris v. Superior Court, 53 Cal. 4th 170, 181-82 (2011). This minor distinction between the federal and state test arises from the fact that California's Wage Order 4-2001 incorporates the pre-2004 amendments to the FLSA regulations,²³ including former 29 C.F.R. § 541.205 which no longer exists. Work that is qualitatively administrative means work that is "administrative in nature," which includes "work done by 'white collar' employees engaged in servicing a business. Such servicing may include, as potentially relevant here, advising management, planning, negotiating, and representing a company." Id. at 182. The qualitatively administrative analysis is co-extensive with the FLSA "directly related" analysis, as Plaintiffs concede in their reply, and Farmers has not satisfied that element. Under California law, a job is quantitatively administrative if it is "of substantial importance to the management or operations of the business." Id. at 181. Farmers may be right that Plaintiffs' work is substantially important to its operations because Plaintiffs' work contribute to savings of approximately \$50-60 million annually. However, because Farmers has not carried

²³ The pre-2004 version of the regulations were "substantially the same as under the prior rule." DOL Opinion Letter, Wage & Hour Div., 2005 WL 3308592, at *1 (Aug. 19, 2005) (citing Robinson-Smith v. Gov't Employees Ins. Co., 323 F. Supp. 2d 12 (D.D.C. 2004); McLaughlin v. Nationwide Mutual Ins. Co., 2004 WL 1857112 (D. Or. Aug. 18, 2004)).

its burden on the other qualitative element of the California exemption, summary judgment in favor of Plaintiffs is warranted on the California and FLSA misclassification claims.

c. Discretion and Independent Judgment

As an additional and separate ground for summary judgment, the administrative exemption is not fulfilled because Plaintiffs do not exercise the necessary discretion and independent judgment in carrying out their primary duty. The regulations counsel that “the exercise of discretion and independent judgment involves the comparison and the evaluation of possible course of conduct, and acting or making a decision after the various possibilities have been considered.” 29 C.F.R. § 541.202(a). Whether an employee exercises discretion and independent judgment is determined on a case-by-case basis and is based on the following factors:

[W]hether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee’s assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

29 C.F.R. § 541.202(b).

Plaintiffs argue that it is undisputed that Farmers has continued to prohibit their special investigators from including subjective opinions and conclusions from their written reports. Plaintiffs note that in Fenton the court concluded that the special investigators’ primary duty does not entail the exercise of discretion because their “subjective opinions and conclusions are excluded from their written reports.” Fenton, 663 F. Supp. 2d at 727. It found that the exclusion of subjective opinions and conclusions outweighed the fact that the special investigators had some discretion in how they conducted their investigations. Id. at 726-27. Because Plaintiffs’ reports still do not set forth conclusions, Plaintiffs urge the Court to adopt the Fenton analysis and find

1 that this prong is not satisfied. Moreover, Plaintiffs contend that they are not exercising discretion
2 over “matters of significance” because they are merely applying well-established techniques to
3 gather all facts, good and bad, and convey them to the Claims representative. Plaintiffs ignore the
4 fact that Farmers has implemented some changes to their duties in the years since the Fenton
5 court’s ruling, including elimination of the QA checklists that previously mandated that Plaintiffs
6 take certain investigative steps in each investigation regardless of whether a particular suspicious
7 claim called for them.

8 With respect to the factors listed above that are used to consider whether there is adequate
9 discretion and judgment exercised, Plaintiffs contend that none apply. They also argue that even
10 those that facially seem to apply, such as “whether the employee provides consultation or expert
11 advice to management” and “whether the employee investigates and resolves matters of
12 significance on behalf of management,” do not actually apply here. They emphasize that the
13 special investigators are merely responsible for gathering all relevant facts and passing them along
14 to the Claims representatives so that they can make an ultimate determination. Moreover,
15 Plaintiffs distinguish the services they provide from advising “management” on the grounds that
16 the special investigators only advise, if they can be considered advising at all, on individual claims
17 and not on a broader company policy.

18 Farmers cites Roe-Midgett v. CC Servs., Inc., 512 F.3d 865 (7th Cir. 2008), in which the
19 Seventh Circuit upheld entry of summary judgment for the defendant on whether a group of
20 appraisers were administratively exempt. The defendant contracted with insurance companies to
21 provide claims processing services for auto, home, commercial, and farm policies. Id. at 867. The
22 appraisers “provide claims adjustment services for [the defendant’s] insurance company clients up
23 to a \$12,000 limit of claims settlement authority and represent the ‘face’ of [the defendant] to the
24 countless claimants with whom they interact.” Id. The Seventh Circuit summarized the
25 appraisers’ responsibilities:

26 They spend much of their time in the field without direct supervision.
27 They conduct on-site investigations of first- and third-party
28 automobile insurance claims; interview claimants, witnesses, and law
enforcement personnel; estimate loss; determine whether parts should
be repaired or replaced; negotiate with mechanics and body shops and

1 draft final repair estimates; and settle claims up to the limit of their
\$12,000 settlement authority.

2 Id. While the appraisers were not personally responsible for resolving issues of coverage or
3 liability, the Seventh Circuit noted that they “routinely use their discretion and independent
4 judgment to make choices that impact damage estimates, settlement, and other ‘matters of
5 significance’” because “their assessment of the damage and its cause bear directly on the ultimate
6 coverage determination.” Id. at 874 (quoting 29 C.F.R. § 541.207(a)). On balance, the court
7 found that the appraisers’ “day-to-day responsibilities mirror the duties the new regulations
8 attribute to exempt ‘claims adjusters’” and therefore the appraisers were also exempt. Id. at 874-
9 75. While Plaintiffs’ role is somewhat similar to the appraisers’ job in Roe-Midgett, the
10 appraisers’ responsibilities are distinguishable in the degree of independence that they exercised.
11 Unlike the special investigators, in addition to investigating claims, which involved investigating
12 claims *generally* and not merely for indicators of fraud as Plaintiffs do here, the appraisers also
13 negotiated repairs, estimated loss, and settled claims. These tasks require the exercise of judgment
14 that goes far beyond investigating specific indications of fraud and reporting the outcome of that
15 investigation to Claims representatives, who are much more closely aligned with the work of the
16 appraisers in Roe-Midgett.

17 Another non-binding case cited by Farmers, Mullins v. Target Corp., 2011 WL 13991262
18 (N.D. Ill. Apr. 13, 2011), is somewhat more aligned with the facts of this case. The plaintiff was a
19 Target employee who identified and conducted investigations of fraud and theft at several Target
20 stores. Id. at *2. The plaintiff reviewed information that had been entered into a database by
21 Target store employees to identify instances where she believed fraud might be occurring. Id. at
22 *3. Once she developed a potential case for investigation, she brought it to her supervisor for
23 approval. Id. She then started running the investigation, seeking approval from her supervisor
24 along the way as needed. Id. Eventually, if a strong enough case was made, the plaintiff brought
25 the information she developed in her investigation to law enforcement. Id. On the discretion and
26 judgment element, the court found that “[n]otwithstanding that there are only so many tactics to
27 choose from, Investigators use their judgment to decide which ones to employ.” Id. at *7. Thus,
28 she “exercised independent judgment and discretion not only in selecting cases and in planning

1 out strategies and tactics for investigations, but in carrying out those investigations.” Id. at *7. In
 2 the same way that the Mullins plaintiff was responsible for planning her investigative steps,
 3 Plaintiffs did here, too, and here Plaintiffs functioned under a lower level of supervision.
 4 However, Mullins is also somewhat distinguishable because the plaintiff was responsible for
 5 identifying her own cases for investigation, whereas cases are typically referred to Plaintiffs by the
 6 Claims representatives, although Plaintiffs can decline them.

7 Focusing only on the special investigators’ primary duty of conducting investigations of
 8 fraud indicators on referred claims, the record reflects that Plaintiffs act independently in planning
 9 and carrying out their investigations. Post-Fenton, Farmers eliminated the checklists and initiated
 10 their IQ program, which left significantly more leeway in the hands of the special investigators to
 11 structure their investigations as they felt was appropriate for the claim involved. Special
 12 investigators’ custom of communicating and collaborating with the Claims representatives during
 13 the course of their investigations does not significantly reduce the independence they exercise.
 14 However, “mak[ing] decisions regarding the precise manner in which they conduct an
 15 investigation – creating action plans, deciding who to interview, what documents to review, what
 16 leads to follow, and whether to recommend hiring an expert – . . . are more appropriately viewed
 17 as choices among ‘established techniques, procedures or specific standards described in manuals
 18 or other sources,’” that are not considered exercises of discretion and independent judgment with
 19 respect to matters of significance for purposes of the administrative exemption. Ahle v. Veracity
 20 Research Co., 738 F. Supp. 2d 896, 907 (D. Minn. 2010) (quoting 29 C.F.R. § 541.202(a), (e));
 21 see also Gusdonovich v. Business Info. Co., 705 F. Supp. 262, 265 (W.D. Pa. 1985)
 22 (“investigators were merely applying their knowledge and skill in determining what procedure to
 23 follow, which . . . is not the exercise of discretion and independent judgment contemplated by the
 24 regulation.”).

25 On the record here, Plaintiffs do not exercise the necessary discretion and independent
 26 judgment in the way they report their findings to the Claims representatives. Farmers urges the
 27 Court to adopt the Sixth Circuit’s position in Foster that the investigators were focused on the
 28 “search[] for the truth” and that “[d]etermining truth requires ‘factual findings,’ a process that

necessarily required judgment and discretion.” Foster, 710 F.3d at 648 (quoting Foster v. Nationwide Mut. Ins., Co., 2012 WL407442, at *19 (S.D. Ohio Jan. 5, 2012)). In reaching the conclusion that the special investigators’ findings of fact demonstrated the exercise of discretion, the Sixth Circuit distinguished Fenton v. Farmers Ins. Exch., 663 F. Supp. 2d 718 (D. Minn. 2009) and another District of Minnesota case (Ahle v. Veracity Research Co., 738 F. Supp. 2d 896 (D. Minn. 2010)), both of which found that the administrative exemption did not apply to insurance claim special investigators. In particular, with respect to Fenton, the Sixth Circuit explained that the special investigators in that case were different because they provided both inculpatory and exculpatory evidence, all of which was then used by the claims representative to evaluate whether to pay the claim. Foster, 710 F.3d at 640-50. Thus, in contrast to the Foster special investigators who made “factual findings,” the Fenton special investigators merely developed a factual record. Id. at 750. This is a very fine distinction. The evidence submitted here indicates that Plaintiffs investigated fraud indicators and turned over the facts they discovered during their investigation, without regard to whether the facts were good or bad. Although Plaintiffs are no longer required to include every single fact in their report if it is not relevant to the claim review process, Plaintiffs are apparently not resolving factual disputes and presenting ultimate findings. In this way, Plaintiffs’ reports are closer to those that Farmers’ special investigators created at the time of Fenton than those at issue in Foster.²⁴ In sum, the record reflects a policy of reporting all pertinent information uncovered in the investigation, rather than the “factual findings” and “search for truth” that were so important in Foster.

Accordingly, the Court also grants summary judgment in favor of Plaintiffs on the administrative exemption on the alternative basis that Plaintiffs’ primary duty does not reflect an exercise of discretion and independent judgment.

²⁴ The Foster court also held that the investigators’ practice of giving informal opinions to claims representatives supported the conclusion that the investigators used discretion and independent judgment. It explained that “[t]he discretion and independent judgment exercised in determining and communicating (albeit informally) the legitimacy or illegitimacy of suspicious claims referred for investigation is a matter of significance to Nationwide,” even though the investigators were not officially allowed to convey their opinions about whether a claim was fraudulent. Id. at 650. This Court has concluded, however, that some Plaintiffs’ decisions to give occasional or even frequent informal opinions is not part of their primary duty.

B. Willfulness & the Statute of Limitations

Plaintiffs also move for summary judgment on whether Farmers' violations of the FLSA were willful. FLSA's statute of limitations is two years, unless an employer willfully violates the FLSA, which extends the statute of limitations to three years. 29 U.S.C. § 255(a); Alvarez v. IBP, Inc., 339 F.3d 894, 908 (9th Cir. 2003) (citing McLaughlin v. Richland Shoe Co., 486 U.S. 128, 135 (1988)). Extending the statute of limitations to three years does not require a finding that the employer knowingly violated the FLSA. Alvarez, 339 F.3d at 908. "[R]ather, the three-year term can apply where an employer disregarded the very 'possibility' that it was violating the statute, although [the court] will not presume that conduct was willful in the absence of evidence." Id. at 908-09 (citing Herman v. RSR Sec. Servs. Ltd., 172 F.3d 132, 141 (2d Cir. 1999) and Cox v. Brookshire Grocery Co., 919 F.2d 354, 356 (5th Cir. 1990)). This requires "evidence of an employer's 'kn[owing] or [] reckless disregard for the matter of whether its conduct was prohibited by the statute.'" Id. at 909 (quoting Richland Shoe, 486 U.S. at 133) (alteration in original).

Plaintiffs argue that Farmers acted willfully by failing to reclassify Plaintiffs, maintaining that the exempt was appropriate, and not changing the special investigator job after the Fenton court's summary judgment ruling in favor of the plaintiffs in 2009. Plaintiffs' assertion that Farmers did not change the special investigators' job is inaccurate, as it eliminated the investigation checklist and converted its QA program to the IQ system around 2013 or 2014. In 2015, Farmers also stopped performing routine audits of SIU's investigation. Plaintiffs are correct, however, that Mr. Serafin, former SIU Director, testified in his deposition that the Fenton decision did not factor into the implementation of the IQ system because they believed they were in compliance with the FLSA and that the Fenton decision was wrongly decided. The Fenton parties settled the case after summary judgment and an appeal was never taken.

While the Fenton court did not rely exclusively on the QA standards to find that the special investigators did not exercise sufficient discretion or independent judgment, it noted that the "QA review guidelines . . . explain in great detail how plaintiffs should approach dozens of issues that typically arise in the performance and documentation of investigations." Fenton, 663 F. Supp. 2d

1 at 726. After Fenton, Farmers did not change its standards to allow special investigators to
 2 provide their ultimate conclusions on whether a claim is fraudulent, but it did substantially revise
 3 its guidelines in the years after the decision to eliminate the QA standards, thereby giving special
 4 investigators greater control to tailor their investigation to a particular claim file.

5 Farmers contends that it made other changes to the special investigators' job, such as
 6 determining whether SIU involvement is appropriate in the first place and requiring that
 7 investigators only include relevant information in their final report, as opposed to an exhaustive
 8 recitation of all the information gathered in their investigations. Based on the record citations
 9 Farmers provided to the court, both in its original briefing and the supplemental briefing supplied
 10 after the hearing, it is not clear that these were actual changes implemented post-Fenton. Instead,
 11 Farmers largely relies on comparing statements in the Fenton decision that described the special
 12 investigators' role at the time to standards that were in place in 2013 (see Ex. 18, Wedding Decl.,
 13 ¶ 30, Ex. E) or vague testimony about moving from the QA guidelines to behavior-based standards
 14 (see Ex. 15, Serafin Dep. at 50:3-52:1) to argue that the responsibilities and expectations of the
 15 position evolved in the period after Fenton. The Court cannot easily verify the Fenton court's
 16 characterization of the special investigators' duties at that time because it does not have the
 17 underlying evidence that was before the Fenton court. Accordingly, this evidence is inconclusive
 18 in establishing when or even whether these more specific job changes took place as Farmers
 19 asserts.

20 Moreover, as to the information provided in the special investigators' final reports, the
 21 2013 SIU QAE Explainer that Farmers submitted does not directly conflict with the QA guidelines
 22 that support the Fenton court's determination that the special investigators provided an
 23 "exhaustive file" at the end of their work. Fenton, 663 F. Supp. 2d at 722, 726-27. The pre-
 24 Fenton QA guidelines stated that the special investigators' "purpose is to provide . . . factual
 25 information that allows the Claims Professionals . . . to make good decisions, not tell them what
 26 decision to make, or provide conjecture on what really happened." Id. at 727. The QA guidelines
 27 required special investigators to include "[a]ll inculpatory and exculpatory information . . . in equal
 28 detail and emphasis," and provided that "[o]pinions and/or speculative 'what if' scenarios are not

1 acceptable.” Id. They further provided that “[a]ll reports must be attached to the file, even if the
2 result was no information available.” Id.

3 The later guidelines cited by Farmers do not seem to represent a major change as to the
4 information Plaintiffs must provide to the Claims Representatives. While the 2013 SIU QAE
5 Explainer stated that the documentation “should be as concise as reasonably possible,” Ex. 18,
6 Wedding Decl., ¶ 30, Ex. E at FIE-DF000959, it also required inclusion of “their investigative
7 actions and any information developed that could potentially impact the claim decision.” Id. at
8 FIE-DF000957. More specifically, it must “list the relevant investigation actions completed,
9 identify and explain the SI’s conclusions, summarize any significant findings, address the outcome
10 of identified indicators, detail any discrepancies or unresolved issues, and be supported by facts
11 (investigative activity).” Id. at FIE-DF000958. Moreover, the 2013 guidelines were explicit that
12 special investigators were required to “evidence the SI’s strategic thinking as they developed their
13 investigation. This should include explaining why they pursued new leads, the reasons for
14 changes to the investigation plan, why they deemed any steps not valuable or decided to eliminate
15 others and the basis for their conclusions.” Id. at FIE-DF000957. As discussed in the background
16 section of this Order, the deposition testimony cited by the parties uniformly demonstrates that
17 Plaintiffs were not allowed to include their subjective opinions about a claim in their reports, just
18 as in the pre-Fenton era. That Plaintiffs were expected to supply “reasonably concise” information
19 and documentation that focuses on “any information developed that could potentially impact the
20 claim” does not establish that Plaintiffs no longer had to provide all relevant claim-related
21 information to Claims Representatives, as it appears they were required to do in the period
22 reviewed by the Fenton court.

23 It is evident, however, that the legal landscape has been shifting on the exempt status of
24 insurance fraud investigators and that Farmers relied on the Sixth Circuit’s decision in Foster.
25 Farmers did not completely alter Plaintiffs’ position after the Fenton decision, although it did
26 make some changes. Farmers stated that it believed the Fenton decision was wrongly decided (the
27 parties settled before appeal), and it maintained that their special investigators were appropriately
28 classified as exempt from overtime. The Sixth Circuit’s Foster decision in 2013 supported

1 Farmers' position before the statute of limitations period began to run, and the Fourth Circuit's
2 Calderon decision in 2015 created a circuit split that complicated case law on the application of
3 the administrative exemption. In light of these competing facts, there are disputed material facts
4 concerning whether Farmers acted willfully in misclassifying the Plaintiffs. Accordingly, the
5 Court denies Plaintiffs' motion for summary judgment on the willfulness issue.

6 **C. Liquidated Damages**

7 Plaintiffs also move for summary judgment on whether Farmers is liable for liquidated
8 damages. "An employer has the burden of showing that the violation of the [FLSA] was in good
9 faith *and* that the employer had reasonable grounds for believing that no violation took place.
10 Absent such a showing, liquidated damages are mandatory." Bratt, 912 F.2d at 1071 (quoting
11 Equal Employment Opportunity Comm'n v. First Citizens Bank, 758 F.2d 397, 403 (9th Cir.
12 1985)) (emphasis in original). This test is composed of subjective and objective components. Id.
13 at 1071-72. "To satisfy the subjective 'good faith' component, the [defendant was] obligated to
14 prove that [it] had 'an honest intention to ascertain what [FLSA] requires and to act in accordance
15 with it.'" Brock v. Shirk, 833 F.2d 1326, 1330 (9th Cir. 1987) (per curiam). "The additional
16 requirement that the employer have reasonable grounds for believing that [its] conduct complies
17 with the Act imposes an objective standard by which to judge the employer's behavior."

18 As discussed above regarding willfulness, Farmers had reasonable grounds for believing
19 that it was in compliance with the FLSA in classifying Plaintiffs as exempt. On the issue of its
20 subjective good faith, Farmers has shown that it made changes to the special investigator position
21 after Fenton, largely in the form of eliminating the QA checklist. Farmers organized a working
22 group in 2011, two years after Fenton, to evaluate the investigator position. While Mr. Serafin
23 testified that the Fenton decision was not a factor in switching to the IQ system and away from the
24 QA review and the investigation checklist, he also provided testimony that Farmers believed the
25 Fenton decision was wrongly decided and Plaintiffs' exempt status was lawful. On this record, the
26 Court declines to enter summary judgment in favor of Plaintiffs on the availability of liquidated
27 damages.
28

D. Calculation of FLSA Damages

Plaintiffs ask the Court to award FLSA damages at a rate of 0.5x versus 1.5x regular pay. The standard rate for compensating for overtime hours under the FLSA is “at a rate not less than one and one-half times the regular rate at which [the employee] is employed.” 29 U.S.C. § 207(a).

The origin for this request is 29 C.F.R. § 778.114(a), which incorporates the “fluctuating workweek” (“FWW”) theory for calculating damages. The FWW theory applies to “[a]n employee employed on a salary basis [who] may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many.” 29 C.F.R. § 778.114(a). It is applicable where “there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours . . . and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay.” *Id.* Under these circumstances, the regulation provides that “[p]ayment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.” *Id.* Overtime pay must be made contemporaneously with employee’s regular pay. 29 C.F.R. §778.114(c) (“Where all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for nonovertime hours, compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula.”). This regulation codified the Supreme Court’s decision in Overnight Motor Transport Co. v. Missel, 316 U.S. 572, 580 (1942), which approved alternative overtime compensation methods for employees who are paid fixed wages regardless of the number of hours they work.

The parties disagree over whether this regulation applies to a misclassification case. The Ninth Circuit has not addressed the issue, although the First, Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits have all found that FWW may be used to calculate damages where employees are misclassified. *See Valerio v. Putnam Assocs., Inc.*, 173 F. 3d 35 (1st Cir. 1995); Desmond v.

1 PNGI Charles Town Gaming, LLC, 630 F. 3d 351 (4th Cir. 2011); Blackmon v. Brookshire
 2 Grocery Co., 835 F.2d 1135 (5th Cir. 1988); Urnikis-Negro v. Am. Family Prop. Servs., 616 F. 3d
 3 665 (7th Cir. 2010); Clements v. Serco, Inc., 530 F. 3d 1224, 1230-31 (10th Cir. 2008). Some of
 4 these courts have reasoned that the regulation only requires that the employer and employee have
 5 a “clear mutual understanding” that while “the employee’s hours may vary, his or her base salary
 6 will not.” Clements, 530 F.3d at 1230. However, the Tenth Circuit noted that the regulation does
 7 not require that the parties agree on how “overtime premiums would be calculated.” Id.; see also
 8 Valerio, 173 F. 3d at 38-40; Blackmon, 835 F. 2d at 1138-39. Other courts have relied on Missel
 9 to hold that the FWW can be applied retroactively in misclassification cases if the plaintiffs’
 10 wages were intended to compensation her for all hours worked, regardless of the number worked
 11 in a given week. Urnikis-Negro, 616 F.3d at 681; see also Desmond, 630 F. 3d at 354-57.

12 While the Ninth Circuit has not reached the issue, numerous district courts within the
 13 Ninth Circuit have come to the contrary conclusion that this regulation cannot be applied
 14 retroactively to a misclassified worker because she and her employer could not have a “clear
 15 mutual understanding” about the payment of overtime. Boyce v. Independent Brewers, 223 F.
 16 Supp. 3d 942 (N.D. Cal. 2016), following other district courts within the Ninth Circuit, rejected
 17 the out-of-circuit holdings as contrary to the full text of the regulation. As Boyce points out, the
 18 regulation provides that the employees and employer have a “clear mutual understanding . . . that
 19 the fixed salary is compensation (apart from overtime premiums) for the hours worked each
 20 workweek.” 29 C.F.R. § 778.114(a). It reasoned persuasively that “[i]n a misclassification case,
 21 the parties entered into an agreement on the presumption that the employee was not entitled to any
 22 overtime premiums and, therefore, there could not have been any clear mutual understanding that
 23 the compensation being provided did not include such premiums.” Boyce, 223 F. Supp. 3d at 946;
 24 see also Zulewski v. Hershey Co., 2013 WL 633402, at *5 (N.D. Cal. Feb. 20, 2013) (if the
 25 employees were “found to be misclassified as exempt employees, the inquiry regarding whether
 26 individual [employees] ‘consented’ to a FWW is improper because when employees are
 27 misclassified, they have unwittingly agreed to forego their entitlement to overtime—a right which
 28 cannot be waived”); Russell v. Wells Fargo & Co., 672 F. Supp. 2d 1008, 1014 (N.D. Cal. Nov.

17, 2009) (“an effective clear mutual understanding is absent in misclassification cases”). Moreover, the regulation requires the contemporaneous payment of overtime, which is absent, by definition, in misclassification cases. See Boyce, 223 F. Supp. 3d at 946; Russell, 672 F. Supp. 2d at 1012.

The Court finds this reasoning more persuasive based on the language of the rule. Thus, the Court grants Plaintiffs’ motion for summary judgment as to calculating overtime based on 1.5x wages.

E. Laughlin’s FLSA Claim

Farmers moves for summary judgment on Plaintiff Laughlin’s FLSA claim on the grounds that it is time barred because her employment ended more than three years before she filed her notice of consent to join. Partlow v. Jewish Orphans’ Home of So. Cal., Inc., 645 F.2d 757, 760 (9th Cir. 1981) (“the FLSA statute of limitations continues to run until a valid consent is filed”), abrogated on other grounds by Hoffmann-LaRoche v. Sperling, 493 U.S. 165 (1989). The undisputed evidence supports Farmers’ position and Plaintiffs have not opposed this aspect of Farmers’ motion. Thus, the Court grants Farmers’ motion for summary judgment on Plaintiff Laughlin’s FLSA claim.

F. Derivative State Law Claims

1. California Labor Code Section 203 Waiting Time Penalties

California law requires employers to pay all wages due at the time of an employee’s termination or within 72 hours of the employee’s resignation. Cal. Lab. Code §§ 201, 203. If an employer willfully fails to pay wages due at termination, it must pay penalties. Cal. Lab. Code § 203. “[W]illful’ merely means that the employer intentionally failed or refused to perform an action *which was required to be done.*” Kao v. Holiday, 12 Cal. App. 5th 947, 963 (Cal. Ct. App. 2017) (quoting Barnhill v. Robert Saunders & Co., 125 Cal. App. 3d 1, 7 (1981)) (emphasis in original). “[A] good faith dispute that any wages are due will preclude imposition of waiting time penalties . . .” Id. (quoting Cal. Code Regs., tit. 8, § 13520).

For the reasons discussed above, Plaintiffs have failed to carry their burden to show that Farmers acted willfully in misclassifying Plaintiffs, which would also forestall a finding that

Farmers willfully failed to pay wages due on time because it did not believe that overtime was due. Because there is a triable issue of fact on willfulness, the Court declines to grant summary judgment in favor of Plaintiffs on this issue.

2. California Meal Periods

Plaintiffs contend that Farmers is liable for failure to maintain a policy providing a second meal period when its special investigators worked 10 or more hours in one day and move for summary judgment on this claim.²⁵ Under California law, an employer must generally “provide an employee a 30-minute meal break for a work period of more than five hours and a second 30-minute meal break for a work period of more than 10 hours per day with certain specified waivers.”²⁶ Bradley v. Networkers Int’l, LLC, 211 Cal. App. 4th 1129, 1149 (Cal. Ct. App. 2012) (citing Cal. Lab. Code § 512(a); Cal. Code Regs., tit. 8, § 11040(11)). “If an employer fails to provide an employee [the required] meal period or rest period . . . , the employer shall pay the employee one additional hour of pay at the employee’s regular rate of compensation for each work day that the meal . . . period is not provided.” Id. (Cal. Lab. Code § 226.7(b) [now subd. (c)]).

The undisputed evidence is that Farmers’ meal break policies did not expressly provide for second meal breaks for exempt employees, thereby excluding Plaintiffs who were uniformly classified as exempt. However, one of the policies provided to the Court did permit second meal breaks for non-exempt employees.

When an employer “adopts a uniform policy authorizing and permitting only one . . . break . . . when two are required – it has violated the wage order and is liable.” Brinker Rest. Corp. v. Superior Court, 53 Cal. 4th 1004, 1033 (2012). A corollary to this rule is that “when an employer has not authorized and not provided legally-required meal and/or rest breaks, the employer has violated the law,” regardless of whether an employee may have actually taken the break during the work day. Bradley, 211 Cal. App. 4th at 1152.

²⁵ At the hearing on this motion, Plaintiffs confirmed that they are no longer pursuing their rest break claim.

²⁶ Pursuant to the Industrial Welfare Commission Wage Order 4-2001, the meal and rest break requirements do not apply to exempt employees.

The parties argue past themselves on this issue. Farmers contends that it is clear that Plaintiffs understood that they were permitted to take second meal breaks if they worked more than 10 hours, noting that special investigators primarily worked from home and the field and controlled their own schedules and that Plaintiffs admitted that they were not prevented from taking meal breaks when they wanted to do so. See Brinker, 53 Cal. 4th at 1036 (an “employer satisfies [its] obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so”). Plaintiffs theory, however, is that Farmers’ policy was unlawful because it did not specifically allow the purportedly misclassified special investigators to take a second meal break, even though at least one version of the policy permitted non-exempt employees to take second meal breaks.

As discussed in Section I.F, one version of the break policy provides for a second meal break. This raises a triable issue of fact on this claim. The undisputed record shows that Farmers’ policy may have provided the required break, although it is not clear when and to whom this one policy applied. Accordingly, the Court denies Plaintiffs’ motion for summary judgment on the meal break claim.

3. Itemized Wage Statements (CA, NY) & Information About Compensation (NY)

Plaintiffs move for summary judgment on their claims that Farmers failed to provide Plaintiffs with the itemized wage statements that are required under New York and California Law. See Cal. Lab. Code § 226(a)(2); N.Y. Lab. Law § 195(3). In addition, Plaintiffs also move for summary judgment on their New York state law claim that Farmers failed to provide Plaintiff Laughlin with required information about the timing, method, and amount of pay when she was hired, as required by New York Labor Law § 195(1). Violation of all three of these laws subject the employer to penalties. See Cal. Lab. Code § 226(e), N.Y. Lab. Law §§ 198(1-b), 198(1-d).

The undisputed evidence shows that Farmers did not track Plaintiffs’ hours worked, much less include those hours on their pay records. Farmers acknowledges in its motion that the California itemized wage statement claims are derivative of and rise or fall with the FLSA claim.

1 With respect to the New York claims only, Farmers argues that Laughlin's New York
2 claims should be dismissed because the Court should decline to exercise supplemental jurisdiction
3 over them now that it has dismissed her FLSA claim as time-barred. At the hearing, Plaintiffs
4 asserted that there likely was diversity jurisdiction over Laughlin's New York claims but that, in
5 any event, the Court should continue its exercise of supplemental jurisdiction over Laughlin's
6 claims.

7 In a post-hearing brief filed by Plaintiffs they contend that "a preliminary damages
8 calculation" shows that Laughlin's damages will exceed \$75,000. They explain that her salary
9 was approximately \$80,000 per year (\$1,538.46 per week and \$38.46 per hour). Her overtime rate
10 (1.5x) is \$57.69. Laughlin estimates that she worked approximately 15 hours of overtime per
11 week, so that her weekly wage loss was \$865.35 before liquidated damages are taken into account.
12 She is eligible for 136 weeks overtime under New York law, so without liquidated damages her
13 maximum damages are \$117,687.60. Farmers admitted in its answer to the operative complaint
14 that its principal place of business is in Los Angeles, and Plaintiffs alleged in their complaint that
15 Laughlin is a resident of Levittown, New York.

16 Plaintiffs did not supply a declaration from Laughlin attesting to these damages estimates
17 and they did not plead allegations about her damages in the complaint, although Farmers did not
18 file a brief challenging these numbers. "When a plaintiff files suit in federal court, [the Ninth
19 Circuit] use[s] the 'legal certainty' test to determine whether the complaint meets § 1332(a)'s
20 amount in controversy requirement." Naffe v. Frey, 789 F.3d 1030, 1039 (citing Pachinger v.
21 MGM Grand Hotel-Las Vegas, Inc., 802 F.2d 362, 363-64 (9th Cir. 1986)). Using this test, "the
22 amount in controversy is determined from the face of the pleadings," which "means a federal
23 court has subject matter jurisdiction unless 'upon the face of the complaint, it is obvious that the
24 suit cannot involve the necessary amount.'" Geographic Expeditions, Inc. v. Estate of Lhotka ex
25 rel. Lhotka, 559 F.3d 1102, 1106 (9th Cir. 2010) (quoting Crum v. Circus Circus Enters., 231 F.3d
26 1129, 1130 (9th Cir. 2000)).

27 The allegations of the complaint support Plaintiffs' contention that the Court has diversity
28 jurisdiction over Laughlin's claims. The complaint generally alleges the contours of Plaintiffs'

1 job as special investigators. It also alleges that Plaintiffs Francis and Deluca worked at least 10
2 and 15 hours of overtime per week, respectively, and that other special investigators regularly
3 worked over 40 hours per week. This supports Laughlin's estimate that she worked approximately
4 15 hours of overtime per week. The complaint also alleges that Laughlin worked for Farmers for
5 close to three years from approximately December 2011 to September 2014. From these
6 allegations and the information Plaintiffs supplied after the hearing, it is far from a legal certainty
7 that the amount of controversy is not met on Laughlin's state law claims.

8 Even if the Court did not have diversity jurisdiction, the Court would exercise
9 supplemental jurisdiction over Laughlin's state law claims. Pursuant to the supplemental
10 jurisdiction statute,

[D]istrict courts may decline to exercise supplemental jurisdiction
over a claim under subsection (a) if –

- (1) the claim raises a novel or complex issue of State law,
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
- (3) the district court has dismissed all claims over which it has original jurisdiction, or
- (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

15 28 U.S.C. § 1367(c). Farmers argues that subsection (c)(3) applies here because the Court is
16 dismissing Laughlin's FLSA claim as time-barred, which is the only federal claim she asserts.

17 When one of the four prongs of 28 U.S.C. § 1367(c) is applicable, courts consider the four
18 factors of economy, convenience, fairness, and comity when deciding if they will continue to
19 maintain supplemental jurisdiction. See Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350
20 (1988) (“When the balance of these factors indicates that a case properly belongs in state court, as
21 when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law
22 claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case
23 without prejudice.”).

24 This case is advanced. After the Court enters its summary judgment order, the parties will
25 likely need to complete some discovery, as reflected by the case schedule which incorporates a
26 period of post-summary judgment discovery. After that, however, the case will proceed to trial.
27 In addition, Laughlin's claims almost entirely overlap with the claims of the other Plaintiffs, all of
28

which remain in this case. Thus, while Laughlin's own FLSA claim will be dismissed, the other Plaintiffs' federal claim remains. At this point, discovery on Laughlin's state law claims has likely been taken and, if any discovery remains on her claims, it will only add a small, incremental burden to whatever discovery must be taken on the other substantially identical claims of the other Plaintiffs. This significant overlap between the claims means that maintaining this case in federal court is the more efficient option, and there is no special state law expertise needed to adjudicate the claims. In this way, comity is not necessarily well-served by dismissing Laughlin's claims and requiring her to refile in New York state court, particularly given the advanced procedural posture of this case. While Laughlin's claims have only been in this case since November 2018, they rest largely on litigation surrounding the FLSA claims which has been in litigated since January 2017. While the "usual case" might warrant declining to exercise supplemental jurisdiction when a plaintiff's federal claims are dismissed, Carnegie-Mellon, 484 U.S. at 351 n.7, the balance of the relevant factors does not justify doing so in this case.

Accordingly, because the Court has granted summary judgment in favor of Plaintiffs on the administrative exemption, the Court also grants their motion for summary judgment on the California itemized wage statements claim. Further, the Court will continue to exercise supplemental jurisdiction over Laughlin's New York state claims and grants summary judgment in her favor on the itemized wage statements and the claim that Farmers failed to provide Plaintiff Laughlin with required information about the timing, method, and amount of pay in violation of New York Labor Law § 195(1). Therefore, the Court also grants summary judgment in favor of Plaintiff Laughlin on her state law claims.

4. California Unfair Competition Law

Farmers moved for summary judgment on Plaintiffs' California UCL claim on the grounds that it is derivative of their claim that Farmers unlawfully withheld overtime due to Plaintiffs' misclassification. See Price v. Starbucks Corp., 192 Cal. App. 4th 1136, 1147 (Cal. Ct. App. 2011) (granting summary judgment on derivative UCL claim fails when the underlying causes of action failed). Plaintiffs did not move for summary judgment on this claim.

The Court has granted Plaintiffs' motion for summary judgment on the application of the

administrative exemption, so the Court denies Farmers' motion for summary judgment on the UCL claim.

G. Trial Plan

Should issues remain for trial, Farmers asks the Court to require Plaintiffs to propose a trial plan that explains how the remaining disputed issues can be tried manageably with collective evidence. The parties are already scheduled to appear before the Court at a case management conference on July 2, 2019. One week in advance, the parties shall file a joint case management statement that includes Plaintiffs' proposed trial plan for the remaining issues and Farmers must provide its response to that plan.

V. CONCLUSION

For the reason set forth above, the Court resolves the cross motions for summary judgment as follows:

- GRANTS Plaintiffs' motion for summary judgment on the administrative exemption and DENIES Farmers' cross motion for summary judgment on the administrative exemption.
- DENIES Plaintiffs' motion for summary judgment on willfulness.
- DENIES Plaintiffs' motion for summary judgment on liquidated damages.
- GRANTS Plaintiffs' motion for summary judgment on the calculation of FLSA damages at 1.5x.
- GRANTS Farmers' motion for summary judgment on Plaintiff Laughlin's FLSA claim.
- DENIES Plaintiffs' motion for summary judgment on the Section 203 waiting time penalties.
- DENIES Plaintiffs' motion for summary judgment on the meal period claim.
- GRANTS Plaintiffs' motion for summary judgment on the itemized wage claims under New York (N.Y. Lab. Law § 195(3)) and California Law (Cal. Lab. Code § 226(a)(2)) and the claim that Farmers failed to provide Plaintiff Laughlin with required information about the timing, method, and amount of pay when she was hired, as required by New York Labor Law § 195(1).
- DENIES Farmers' motion for summary judgment on the California unfair competition law claim.


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IT IS SO ORDERED.

Dated: May 15, 2019


ELIZABETH D. LAPORTE
United States Magistrate Judge

United States District Court
Northern District of California